NO. 81644-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCUISTION,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

Mr. McCuistion challenges on due process and separation of powers grounds the constitutionality of the post-commitment annual review procedure of the sexually violent predator (SVP) statute. He claims a release trial is constitutionally required whenever a SVP presents evidence at the annual review hearing that he or she does not meet commitment criteria, even if that evidence does not address whether the SVP's underlying condition has changed since commitment. He is wrong because in the absence of evidence that a SVP's condition has materially improved as a result of treatment or a permanent decline in the SVP's physical ability to reoffend, due process does not demand a new release trial simply to revisit a commitment that resulted from a proceeding which itself afforded due process protections.

II. ISSUES

This appeal presents the Court with three issues:

1. **Is the post-commitment annual review procedure of RCW 71.09.090 consistent with due process where it requires a release trial only where there is evidence of a material change in the committed person's condition since commitment?**

2. **Does the annual review procedure violate the separation of powers doctrine?**

3. **Whether Mr. McCuistion's evidence, which failed to note any change in his condition since commitment, is sufficient to require a release trial?**

III. FACTS AND PROCEDURAL HISTORY

Mr. McCuistion has an extensive history of sexual offending dating back to 1980 that includes molesting young girls, as well as violently assaulting and raping adult women. CP 55-59. A petition to commit Mr. McCuistion as an SVP was filed shortly before his release from prison for his most recent offense. Mr. McCuistion was found after a trial to meet the statutory definition of an SVP and he was committed as such on October 3, 2003. CP 72. He now seeks a release trial based on his expert's report that challenges the methodology used by prior evaluators of Mr. McCuistion, but fails to discuss or even cite any material change in Mr. McCuistion's condition since his commitment.

As part of the statutorily-required post-commitment annual review process, Mr. McCuistion was evaluated in 2004 and 2005 by two licensed psychologists, Drs. DeMarco and van Dam. CP 26-29, 75-80. Their evaluations were based on extensive documentation regarding Mr. McCuistion, as well as Dr. van Dam's clinical interview and testing of Mr. McCuistion. CP 7-25, 50-72.

These doctors gave similar diagnoses for Mr. McCuistion: Paraphilia Not Otherwise Specified (NOS) (Nonconsent) and Antisocial

Personality Disorder.[1] CP 19-20, 66-68. Drs. DeMarco and van Dam concluded that Mr. McCuistion's mental disorders cause him serious difficulty controlling his sexually violent behavior. CP 23, 72.

In assessing the risk Mr. McCuistion poses to the community, both evaluators noted that Mr. McCuistion has consistently refused to engage in any sexual deviancy treatment, either since his commitment to the Special Commitment Center (SCC), or before his detention there. CP 60. Mr. McCuistion told to Dr. van Dam that he does not believe he has a mental disorder and, so, does not need treatment. CP 63. Using standard actuarial risk assessment tools based on studies of other sex offenders, the doctors concluded that Mr. McCuistion's mental disorders make him more than 50% likely to engage in predatory acts of sexual violence if released. CP 68-71. As a result, they concluded that Mr. McCuistion continues to meet the statutory definition of an SVP. CP 24, 72.

An annual review hearing for 2004-05 was held on October 22, 2006.[2] CP 584. At the hearing, the State relied on Drs. DeMarco and van Dam's evaluations to satisfy its burden of providing prima facie evidence that Mr. McCuistion continues to meet the definition of a SVP. RCW 71.09.090(2)(c)(i). Mr. McCuistion relied on the declarations of

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[1] Paraphilia NOS (Nonconsent) is a disorder characterized by fantasies, urges and behaviors of engaging in forced sex. CP 66.

[2] The failure to hold hearing in 2004 and 2005 was based on Mr. McCuistion's repeated requests for delay in order to obtain expert services. *See,* CP 590-591.

several SCC employees indicating he was well-behaved and that of Dr. Lee Coleman in an effort to show probable cause to believe his condition has "so changed" since commitment such that he no longer meets the definition of a SVP. RCW 71.09.090(2)(c)(ii).

Dr. Coleman's declaration did not address any change in Mr. McCuistion's condition since commitment. Rather, Dr. Coleman's evaluation criticized the diagnostic and risk assessment methodology used by all prior evaluators of Mr. McCuistion, including Dr. DeMarco.[3] CP 617-24. Dr. Coleman opined that the diagnoses assigned to Mr. McCuistion by prior evaluators are improperly based on his past criminal behavior and cannot be linked to impairment in his ability to control his behavior. *Id.*

The trial court found that the State had met its burden and shown through the annual review evaluations of Drs. DeMarco and van Dam that Mr. McCuistion continues to meet the definition of an SVP. CP 586; RCW 71.09.090(2)(c)(i). In addition, the court found that Mr. McCuistion had failed to present sufficient evidence requiring a release trial because Dr. Coleman's declaration did not establish probable cause to believe that his condition has so changed since commitment that he no longer meets the definition of an SVP. CP 587; RCW 71.09.090(2)(c)(ii).

[3] Dr. Coleman's declaration does not mention or address Dr. van Dam's report.

Mr. McCuistion's appeal of the trial court's order was converted by the Court of Appeals' commissioner into a motion for discretionary review and denied. In her denial, the commissioner found that the statutory procedure governing annual review violates neither due process nor separation of powers. In addition, the commissioner held that Mr. McCuistion had not presented any evidence that his condition has changed since his commitment. The Court of Appeals denied Mr. McCuistion's motion to modify the commissioner's ruling.

IV. ARGUMENT

A. The Annual Review Procedures of RCW 71.09.090 Reflect the Indefinite Nature of SVP Commitment and Require a Release Trial Only Where There is Evidence of a Relevant Change in the Condition of the Committed Person Since Commitment.

Mr. McCuistion claims that the annual review procedure of RCW 71.09.090 violates his right to due process. Pet. for Review at 5-13. He argues due process requires a release trial whenever a committed person presents evidence at the annual review hearing that he or she does not meet commitment criteria, even if the evidence does not note a material change in the person's condition since commitment, but rather attacks the original commitment decision or the methods used by the State's experts. His claim is without merit.

The indefinite nature of civil commitment flows from the persistent quality of the mental disorders from which SVPs suffer, which drive their high risk of sexually violent recidivism, as well as the associated uncertainty regarding the amount of inpatient treatment needed to treat those disorders. RCW 71.09.010; *In re Detention of Petersen,* 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (*Petersen* I). The annual review procedure of RCW 71.09.090 reflects the indeterminate character of SVP commitment. This procedure does not require that a release trial be held every year, but only when there is evidence of a relevant change in the SVP's mental or physical condition such that he or she is no longer mentally ill and dangerous.

Although the term of commitment is indefinite, the statute provides numerous procedural protections to SVPs that ensure a periodic and meaningful review of the commitment decision. RCW 71.09.070, .090. The State must annually submit an evaluation by a qualified professional indicating whether the SVP continues to meet commitment criteria. RCW 71.09.070. In addition, the SVP has the right to an annual review hearing, to counsel, to an expert of his or her own choosing and, finally, to a release trial if the State fails in its annual burden, or if the opinion of the SVP's expert establishes probable cause to believe his or her condition has

so changed since commitment that he or she no longer meets commitment criteria. RCW 71.09.070, .090(2)(a)- (c).

B. The 2005 Amendments to the Annual Review Procedure Clarify the Nature of the Change in Condition Necessary to Trigger the Right to a Release Trial.

In response to two court of appeals' decisions, the legislature amended RCW 71.09.090 in 2005 in order to clarify the nature of the change in condition necessary to trigger the requirement of a release trial based on evidence presented by the committed person at the annual review hearing.[4] Laws of 2005, ch. 344. As the legislature noted, one of the primary problems with these decisions is that they permit committed persons to collaterally attack the commitment determination through the annual review process on grounds completely unrelated to any change in the committed person's condition since commitment. *Id.*

This problem is illustrated by Dr. Coleman's declaration. Dr. Coleman does not discuss any changes in Mr. McCuistion's condition since his commitment in 2003. Indeed, that would be difficult since Mr. McCuistion has steadfastly refused to participate in any treatment. As a result, Dr. Coleman instead focuses on criticizing the methodology used

[4] The court of appeals' decisions that spurred the 2005 amendments held that an increase in age since commitment and alleged new diagnostic practices are changes in condition within the meaning of RCW 71.09.090 that are sufficient to require a release trial. *In re Detention of Young*, 120 Wn. App. 753, 761-63, 86 P.3d 810 (2004) (*Young AR*); *In re Detention of Ward*, 125 Wn. App. 381, 386, 104 P.3d 747 (2005).

by all of the numerous other mental health professionals who have evaluated Mr. McCuistion over the years. All but one of the evaluations he criticizes were done before Mr. McCuistion's commitment trial and, to the extent he cites any authority for his assertions, Dr. Coleman points to materials written and published well before Mr. McCuistion's commitment trial in 2003. CP 617-21. There is nothing new in Dr. Coleman's declaration; all of this was available to Mr. McCuistion at the time of his original trial and could have been presented at that time.

As the legislature noted, requiring a release trial on the basis of an expert opinion that does not address any change in condition since the initial commitment determination "subverts the statutory focus on treatment and reduces community safety by removing all incentive for successful treatment participation in favor of passive aging and distracting committed persons from fully engaging in sex offender treatment." Laws of 2005, ch. 344 §1. The 2005 amendments, therefore, make clear the legislature's intent that the focus of the annual review process is on changes in the committed person's condition that have occurred since commitment:

> (b) A new trial proceeding under subsection (3) of this section may be ordered, or held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding:

> (i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or
>
> (ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

RCW 71.09.090(4).

This is not to say that a committed person may never obtain a release trial for reasons other than changes in his or her condition since commitment. For example, if new scientific research showed that, independent of any progress in treatment, Mr. McCuistion's assessed risk of reoffending fell below the statutory threshold, Mr. McCuistion could pursue a release trial through other avenues traditionally reserved for such claims, including CR 60, a personal restraint petition, or through a petition for writ of habeas corpus.[5] The legislature expressly endorsed this approach for evidence that does not relate to post-commitment changes in the committed person's condition. Laws of 2005, ch. 344 §1.

[5] It is important to note that resort to these procedures would likely not be necessary because any generally accepted changes in the underlying diagnostic and risk assessment science would be reflected in the State's annual review evaluation. The experts performing those evaluations have a professional obligation to use the best science available in conducting their assessments.

C. The SVP Annual Review Procedure Does Not Violate Due Process.

Mr. McCuistion challenges the constitutionality of amended RCW 71.09.090. Statutes are presumed constitutional and the burden is on Mr. McCuistion to show beyond a reasonable doubt that the annual review procedure of RCW 71.09.090 violates due process. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 573 (2006).

Whether particular SVP commitment procedures are consistent with due process is governed by the three-part test announced in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), *In re Detention of Stout,* 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Specifically, the reviewing court should consider: 1) The private interest affected by the procedure at issue; 2) The risk of an erroneous deprivation of the private interest through the procedure used, and the probable value, if any, of additional procedural safeguards; and 3) The State's interest, including the fiscal and administrative burdens that the additional procedures would impose. *Id.* at 12-13. Applying this test demonstrates that the SVP annual review procedure is consistent with due process.

1. The Negative Impact of the Annual Review Procedures on Mr. McCuistion's Private Interests is Mixed.

The private interest affected by SVP commitment is the liberty interest in freedom from unnecessary confinement, as well as from the stigma sometimes associated with civil commitment. *Addington v. Texas*, 441 U.S. 418, 425-26, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). However, the negative impact of the annual review procedure on these interests is reduced by other private interests that are served by civil commitment.

The SVP is provided with individualized care and treatment for his or her mental disorders by qualified professional staff. RCW 71.09.080(2); *United States v. Wattleton*, 296 F.3d 1184, 1198-99 (11th Cir. 2002). In addition, any stigma associated with continued commitment is minimal because the person has already been found to be a SVP. *Wattleton*, 296 F.3d at 1199. Finally, there are other procedures through which the SVP can bring collateral challenges that are based on claims not cognizable through the annual review process including a motion to vacate, personal restraint petition and the habeas writ.

2. The Risk of an Erroneous Decision Continuing the Commitment is Very Low Because of the Numerous Procedural Protections Afforded Mr. McCuistion.

The first half of the second *Mathews* factor focuses on the degree to which the procedure at issue may deprive the person of his or her

individual, protected constitutional interest affected by the procedure at issue. The risk that the annual review procedure may deprive Mr. McCuistion of his liberty interest is low.

First, the due process protections built into the pre-commitment and trial provisions of RCW 71.09 provide a high degree of confidence in the validity of the initial commitment decision. These include the adversarial probable cause hearing, as well as the rights associated with the commitment trial: The right to counsel, to an expert, to a 12-person jury, to unanimity of the verdict, and to the beyond-a-reasonable-doubt burden of proof imposed upon the State. RCW 71.09.040-.060(1). This Court recently acknowledged that these procedural protections greatly reduce the risk of an erroneous commitment determination in an SVP case. *In re Detention of Stout*, 159 Wn.2d at 370-71.

Other courts have reached the same conclusion. In *Wattleton,* the court addressed a due process challenge to the release procedures of the federal insanity acquittal statute. In holding the law does not violate due process by placing the burden of proof on the insanity acquittee to show he or she is no longer dangerous in order to obtain release, the court stated:

> The risk of an erroneous decision is significantly reduced because a §4243 hearing arises only after a jury finds a defendant not guilty by reason of insanity and only after all

> the procedural protections have been afforded the defendant in a criminal trial. The insanity verdict establishes both (1) that "the defendant committed an act that constitutes a criminal offense" and (2) that "he committed the act because of a mental illness." The Supreme Court concluded in *Jones* that "the fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness," and "it comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." . . . Thus, the insanity verdict in and of itself supports the conclusion that the insanity acquittee continues to be mentally ill and dangerous.

Wattleton, 296 F.3d at 1199-1200 (quoting, *Jones v. United States,* 463 U.S. 354, 363-64, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)).[6]

In addition, the annual review procedure itself provides numerous additional procedural rights to committed persons that serve to minimize the risk of erroneously continuing the commitment. The State must annually submit an evaluation by a qualified professional indicating whether the SVP continues to meet commitment criteria. RCW 71.09.090(2)(b). If the evaluation indicates the SVP no longer meets criteria, the State must inform the trial court of this and authorize the SVP

[6] Cases such as *Wattleton* involving insanity acquittal release procedures are particularly instructive in SVP cases because both types of cases involve the civil commitment of persons who have been found to be mentally ill and dangerous, and whose dangerousness has been demonstrated by the commission of a criminal offense. This Court has noted the similarities of these commitment schemes on several occasions. *State v. Platt,* 143 Wn.2d 242, 253 n.6, 19 P.3d 412 (2001), *In re Detention of Petersen,* 145 Wn.2d 789, 795, 42 P.3d 952 (2002) (*Petersen II*) (analyzing the annual review procedures of RCW 71.09 by reference to *Foucha v. Louisiana,* 504 U.S. 71 (1992), a case involving Louisiana's insanity acquittal statute.).

to file a petition for release. RCW 71.09.090(1). Even if the annual review indicates the SVP continues to meet criteria, the State must notify the SVP in writing of the right to independently petition for release. RCW 71.09.090(2)(a).

The trial court must hold a hearing unless the SVP affirmatively waives that right. *Id.* If the State fails to provide prima facie evidence at the hearing that the SVP continues to meet commitment criteria, the trial court must order a release trial. RCW 71.09.090(2)(c)(i). Even if the State satisfies its burden, the SVP can obtain a trial through his or her own evidence establishing probable cause to believe he or she is no longer an SVP because of a permanent decline in the physical ability to reoffend, or a change in the mental condition arrived at through treatment. RCW 71.09.090(2)(c)(ii), .090(4). The court of appeals found these annual review procedures important in denying a due process challenge similar to that made by Mr. McCuistion. *In re Detention of Reimer,* 146 Wn. App. 179, 190-91, 190 P.3d 74 (2008); *In re Detention of Fox*, 138 Wn. App. 374, 400, 158 P.3d 69 (2007), *rev. granted in part,* 162 Wn.2d 1019, 178 P.3d 1033 (2008), *and rev'd on other grounds after remand,* 144 Wn. App. 1050 (2008).

Finally, as noted, the committed person has other procedural avenues through which to present challenges to commitment that are not

cognizable via RCW 71.09.090. CR 60(b)(3), (11); RAP 16.4; 28 U.S.C. §2241-2254. The availability of these other avenues to challenge a commitment decision supports the constitutionality of the statute's release provisions. *Wattleton,* 296 F.3d at 1199, fn. 27.

3. The Probable Value of Adopting Mr. McCuistion's Proposed Annual Review Procedure is Negligible and Will Negatively Impact Legitimate State Interests.

Mr. McCuistion's proposed interpretation of what due process requires in the annual review context would do much harm. If accepted, Mr. McCuistion's constitutional rule will require a release trial any time the SVP presents an expert opinion that he or she does not meet the definition of an SVP, regardless of what, if anything, the SVP has done since commitment to address his underlying mental condition or ability to reoffend. For example, a SVP could obtain a release trial every year by simply recycling his or her expert's opinion, even if he or she has previously abandoned it and stipulated to commitment, or it has been implicitly rejected by a jury that found the SVP met commitment criteria. This conclusion is inescapable because the trial court cannot weigh the evidence at the annual review hearing, but must assume it is true. *Petersen II,* 145 Wn.2d at 798.

Mr. McCuistion's proposed rule would also likely result in a steep decline in the number of committed persons engaging in treatment. There

simply would be no incentive to engage in such treatment if there is no link between progress in treatment and release.

Mr. McCuistion's proposed constitutional rule would fundamentally alter the indefinite nature of SVP commitment and turn it into a series of fixed, one-year commitment terms. This runs directly contrary to the legislative intent underlying the SVP statute, as well as this Court's repeated holdings that SVP commitment is indefinite and dependent upon the amelioration of the mental disorders that drive predators to commit sexual offenses. RCW 71.09.010; *Petersen I*, 138 Wn.2d at 81; *In re Detention of Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993).

4. The Annual Review Procedures Serve the State's Compelling Interests in Treatment and Public Safety.

The third factor of the *Mathews* test examines the nature of the State's interests involved in the challenged procedure. The State's interests in treatment and public safety furthered by the SVP statute are compelling. *In re Detention of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). The State's ability to achieve these compelling interests would be fatally undermined by a commitment system that severs the link between treatment progress or a permanent decline in physical condition, and the release trial. Courts have repeatedly recognized that these compelling

State interests outweigh the committed person's private interest when judged in the context of post-commitment review since the person's commitment was triggered by his or her commission of a criminal offense. *See e.g.*, *United States v. Phelps*, 955 F.2d 1258, 1267 (9th Cir. 1992), citing, *Williams v. Wallis*, 734 F.2d 1434, 1440 (11th Cir. 1984) ("The State's interest in preventing the premature release of individuals who have already demonstrated their dangerousness to society by committing a criminal act outweighed the [insanity] acquittee's interest in avoiding continued confinement.").[7]

Finally, the State's interest in the continued treatment of SVPs would be harmed by repeatedly interrupting treatment with unconditional release trials that are unrelated to treatment progress. As the Supreme Court has recognized, the presence of treatment providers "in courtrooms and hearings [is] of little help to patients." *Parham v. J.R.*, 442 U.S. 584, 605-06, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) (rejecting argument that due process requires adversarial hearings for children sought to be civilly committed to State's custody by their parents.).

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[7] Several courts have noted an additional reason in rejecting due process arguments similar to those made by Mr. McCuistion: Because the fiscal and administrative burdens of the proposed procedural safeguards on the State would greatly outweigh any minimal protection they would provide. *Williams v. Wallis*, 734 F.2d at 1439 (11th Cir. 1984); *In re Harhut*, 385 N.W.2d 305, 312 (Minn. S. Ct. 1986). Indeed, this Court recently rejected the argument that due process requires the right to personally confront witnesses in an SVP case, in part because of the "heavy financial burden that would be attendant with requiring live testimony of out-of-state witnesses." *In re Detention of Stout*, 159 Wn.2d at 371.

Application of the *Mathews* test to Mr. McCuistion's due process claim demonstrates he cannot carry his heavy burden of proving RCW 71.09.090 is unconstitutional. On the contrary, the *Mathews* test demonstrates that the annual review procedures strike the appropriate balance between the private and governmental interests at issue.

D. Amended RCW 71.09 Does Not Impermissibly Encroach Upon the Judicial Branch.

Mr. McCuistion also asserts that amended RCW 71.09.090 violates the separation of powers doctrine. Pet. for Review at 13-15. Mr. McCuistion's specific arguments appear to be that the 2005 amendments enacted in response to the court of appeals' decisions impermissibly encroach on the judiciary's independence by determining that evidence not related to a change in condition since commitment is irrelevant. His argument should be rejected because the legislature acted within its power in enacting a law of general application appropriate to establishing policies on the subject of commitment of SVPs.

The legislature did not impermissibly invade the judiciary's role by prospectively amending the law. As the court of appeals noted in rejecting a similar claim, "the Legislature may pass laws that directly impact pending cases in Washington courts." *In re Detention of Fox,* 138 Wn. App. at 394. The amendments are also appropriate because they do

not dictate a particular result, but simply focus the inquiry on a particular time period: Since the person's commitment. *Id.* at 394, fn. 11.[8]

E. Mr. McCuistion Did Not Present Evidence Establishing Probable Cause to Believe His Condition Has Changed Since Commitment.

Finally, Mr. McCuistion also claims that he is entitled to a release trial because the evidence he presented at the annual review hearing demonstrates he does not meet commitment criteria and because the trial court impermissibly weighed the evidence at the probable cause hearing. Pet. for Review at 15-18. Mr. McCuistion's claim of error is without merit. *See,* State's Response to Pet. for Review at 19-26.

It should be noted that the Court of Appeals recently rejected similar evidence. *In re Detention of Reimer*, 146 Wn. App. at 196-99. In that case, Mr. Reimer submitted a declaration by Dr. Coleman that appears identical to that which was submitted by Mr. McCuistion. *Id.* at 197. In concluding that Dr. Coleman's declaration failed to address the statutory requirement of a change since commitment in Mr. Reimer's condition, the court stated:

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[8] This is no different than what the legislature does in other areas. *See e.g., Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 626, 90 P.3d 659 (2004) (legislature has authority to decide appropriate scientific test for water pollution); *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996) (legislature has plenary power to set terms of punishment for the crimes that it has defined); *State v. Ammons*, 105 Wn.2d 175, 181, 718 P.2d 796 (1986) (legislature has power to provide the structure within which a court can exercise its discretion, such as in sentencing).

> Dr. Coleman's reports reveal that he disagrees with Reimer's initial diagnoses and with the legislature's focus on treatment as a reliable predictive factor in determining whether an SVP should be released into the community. As the State argues, Dr. Coleman's reports are rooted in his fundamental disagreement with the statutory criteria that form the basis of Reimer's *initial* commitment. As we have explained in *Fox*, "[T]he legislature documented that RCW 71.09.090 provides a mechanism for an SVP to demonstrate a change in his condition ... rather than an opportunity to attack his original SVP commitment collaterally." Dr. Coleman's reports offer little to establish that Reimer's condition has *changed* . . . . Thus, because Reimer has failed to demonstrate a change in his mental condition "*brought about through positive response to continuing participation in treatment,*" he is not entitled to an evidentiary hearing on these issues. RCW 71.09.090(4)(b)(ii).

Id. at 198-99 (emphasis in original)(citations omitted).

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the trial court and Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

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WASHINGTON STATE SUPREME COURT

In Re the Detention of:

David W. McCuistion

Respondent.

DECLARATION OF SERVICE

I, Karen Burke, declare as follows:

On December 19, 2008, I sent via fax to (206) 587-2710 SUPPLEMENTAL BRIEF OF RESPONDENT postage affixed, addressed as follows:

Nancy Collins
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of December, 2008, at Seattle, Washington.

Karen Burke
KAREN BURKE

NO. 81644-1

WASHINGTON STATE SUPREME COURT

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